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P.O. Box 10397, Kharkov, 61002, Ukraine**

EUROPEAN HUMAN RIGHTS COURT

Council of Europe,
Strasbourg, France

APPLICATION

under Article 34 of the European Convention on Human Rights
and Rules 45 and 47 of the Rules of Court

IMPORTANT: This application is a formal legal document and may affect
your rights and obligations.

I. THE PARTIES

A. *The applicant*

- | | |
|--------------------------------------|---|
| 1. Surname | Timoshenko |
| 2. First name(s) | Yuliya Volodymyrivna |
| Sex: | Female |
| 3. Nationality | Ukrainian |
| 4. Occupation | Leader of "Batkivshchyna" All-Ukrainian Alliance |
| 5. Date and place of birth | 27 November 1960, Dnepropetrovsk, Ukraine |
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| 9. Name of representative 1 | Arkadiy P. Bushchenko |
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B. *The High Contracting Party*

UKRAINE

SUMMARY

Facts

Since December 2010, the applicant has been charged in context of three criminal cases under sections 364 and 365 of the Criminal Code of Ukraine and some other provisions for her actions in period of her being Prime Minister of Ukraine in 2009.

Since December 2010, the freedom of the applicant's movement has been restricted by the authorities in result of application of undertaking not to leave her place of residence.

On 24 May 2011, the applicant was arrested and detained in premises of General Prosecutor's office based on the ruling by Pechersk District Court allowing her arrest and bringing her before a judge for bail or jail hearing.

Complaints

Violation of Article 5 § 1(c) of the Convention

The applicant claims that her arrest and detention were not based on "reasonable suspicion" of any crime committed by her, as the actions imputed to her could not be reasonable considered as an "offence" under domestic criminal law.

Violation of Article 5 § 5 of the Convention

The applicant claims that she has no enforceable right to compensation under domestic law

Violation of Article 2 of the Protocol no. 4 to the Convention

The applicant claims that restriction on her freedom of movement imposed by authorities in the context of criminal prosecution WAS NOT (1) in accordance with law, (2) necessary in democratic society, and (3) subject to independent judicial review.

II. STATEMENT OF THE FACTS

1

2 *Background*

1. At present, the applicant leads “Batkivshchyna” All-Ukrainian Alliance, a political party.

2. During the periods from 24 January 2005 to 8 September 2005 and from 18 December 2007 to 11 March 2010, she occupied the position of the Prime Minister of Ukraine.

3. At the 2006 parliamentary election Yuliya Timoshenko’s Block headed by the applicant prevailed in 14 regions of Ukraine and polled 22,27% nationwide.

4. At the 2007 parliamentary election Yuliya Timoshenko’s Block polled 30,71% throughout Ukraine and received 156 places (from 450 places) at Parliament.

5. She was the main foe of Viktor Yanukovich (President of Ukraine at present) at the 2009 presidential election. In the second round of the election she won support of 45,47% voters staying 3,5% behind the winner.

6. To date, the applicant is the most visible opposition politics and head of the opposition party enjoying most influence and population’s support and having realistic chance to win next parliamentary election.

3 *Criminal charges against the applicant*

7. Since December 2010, three criminal charges have been brought against the applicant.

4 *“Kyoto money case”*

8. On 30 December 2010, the applicant has been charged of two counts of excess of power under section 365 of the Criminal Code of Ukraine (the CCU).

9. According to the prosecution, the underlying events are as follows:

10. In the mid-July 2009, the applicant issued a written order to the State Treasury of Ukraine to convert EUR 180 million – received from the sale of greenhouse gas quota (“Kyoto money”) – into the national currency through the National Bank of Ukraine (NBU) and to record the money at integrated treasury account (ITA) at the State Treasury of Ukraine.

11. On 9 September 2009, the Cabinet of Ministers of Ukraine by its collective decision adopted, in relation to EUR 200 million, the order similar to the described above, and the applicant signed this order as a Prime Minister.

12. State Treasury of Ukraine executed the both orders.

13. According to charge, in both cases the funds placed to the ITA after FX transaction of "Kyoto money" were afterwards, in breach of the national law, allocated to cover various state obligations.

14. The prosecution classifies the signing by the applicant of both orders as excess of power under section 364 § 3 of the CCU aggravated by such elements as "grave consequences" for "state and public interests".

15. According to the prosecution, the applicant's actions entail two-fold "consequences" for "state interests":

– the pecuniary loss by the state of UAH 960,308.64 (under the first count) and UAH 1,162,785.50 (under the second count), which consisted of the commission paid to the NBU for the FX transaction; and

– "undermining of international reputation of Ukraine in the eyes of the Kyoto member states" (see Annex 1, p. 12, 21).

16. The same actions has been classified under sections 364 § 2 (abuse of power) as , according to the charge, the applicant acted "for her own interest", namely, with aim "to avoid detrimental consequences for herself as the Head of the Government in case of failing to perform the state obligations" and "to ensure financing of the state budget expenditures" in "unfavourable situation" when the state could fail "to perform state obligations stipulated in the Law On the State Budget of Ukraine in 2009" (see Annex 1, p. 9, 18, 21).

17. Additionally the same actions has been classified under sections 211 § 2 (issuance of legislative acts which reduce budget revenues or increase budget expenses in violation of the law), 210 § 2 (inappropriate budget expenditures, making budget expenses or granting of credits from the budget without properly established budget appropriations or excess thereof) of the CCU (see Annex 1 p. 21).

5 "Cars case"

18. On 27 January 2011, the criminal case was initiated against the applicant on the charge of the crime envisaged by section 365 of the CCU.

19. The charge against the applicant consists in the fact that she, "being aware of unlawfulness of her actions... signed Order No. 1616-p of 23 December 2009" following which 1000 cars "Opel-Combo" designated for rural medical establishments were cleared by customs with the delay in payment of custom duty that resulted in the budget losses for UAH 36,965,544.17 (see Annex 1 p. 37).

6 "Gas contract case"

20. In April 2011, a criminal case was initiated on the events of January 2009, when National Joint-Stock Company Naftogaz Ukraine (Naf-

togaz) negotiated with Russian Joint-Stock Company Gazprom (Gazprom) on gas supplies to Ukraine.

21. According to the charge, the following events constitute factual basis for charge against the applicant:

22. Under contract valid until 31 December 2009, Gazprom supplied gas to Ukraine at USD 179,5 per 1000 m³. On 31 December 2008, Naftogaz delegation refused to sign the contract with Gazprom on the supply of gas for the next year, as perceived the proposed price at USD 320 per 1000 m³ as excessively high.

23. On 1 January 2009, Gazprom ceased supplying gas to Ukraine.

24. The Ukraine found itself in extremely hard situation: having limited reserve of natural gas, she could not comply with its obligations to transport gas to its European counterparts. In result of this crisis, supply of gas to a number of European countries was stopped. Highest officials of Russian authorities, including President and Prime Minister, made tough statements that Ukraine would buy gas by price USD 450 per 1000 m³

25. On that background, in January 2009 negotiation between Naftogaz and Gazprom on signing of new contract on the supply of gas was resumed.

26. On 17 January 2009, the applicant as the Prime Minister of Ukraine and a head of delegation of the Ukrainian Government held negotiation with the Prime Minister of Russia.

27. Agreement achieved at the intergovernmental negotiation provided for that basic rate for calculating gas price was fixed at level of USD 450 per 1000 m³. Moreover, the parties agreed discount to price for 2009. In result, the real price in 2009 constituted USD 232 per 1000 m³. Also, for 2009 the transit rate of USD 1.7 per 1000 m³ for 100 km was agreed by parties (in 2010 the transit rate was revised and raised up to 70%).

28. On 19 January 2009, the applicant signed the "directive" ("directives") in which she instructed delegation of Naftogaz, during negotiation with delegation of Gazprom on contract for 2009, to be guided by the basic rates the Prime Ministers of Ukraine and Russia had agreed during intergovernmental negotiation.

29. On 19 January 2009, representatives of Naftogaz and Gazprom signed contracts, which provided for the terms specified in the directive of the Prime Minister of Ukraine.

30. According to the prosecution, signing of the abovementioned directive represents the excess of power on the part of the applicant classified under section 365 § 3 of the CCU.

31. In the prosecution's opinion, the applicant issued the abovementioned written directive for the Naftogaz on her own discretion, without

approval by the Cabinet of Ministers of Ukraine, which approval allegedly was obligatory. It was also alleged that this action of the applicant caused pecuniary damage to the state interests on an especially large scale for USD 194,600,000 (see Annex 2, p. 6, 9).

7 *Travel restrictions*

32. On 15 December 2010, an undertaking not leave the place of residence (“recognizance not to leave” – hereinafter referred to as “recognizance not to leave”) was apply to the applicant in the framework of the “Car case”.

33. In January 2011, the applicant applied to the investigator for the permit to go to Brussels.

34. On 31 January 2011, the investigator refused her in the permit.

35. On 20 April 2011, another undertaking was apply to the applicant in the framework of the “Gas contract case” (see Annex 3).

36. On 10 May 2011, the applicant applied to the investigator with the request to cancel the undertaking submitting that the preventive measure was applied without legal grounds. The same day she applied to the investigator for the permit to go to Kharkiv (see Annex 4).

37. On 11 May 2011, the investigator refused to cancel the undertaking (see Annex 5).

38. On 12 May 2011, the investigator refused to give the permit to go to Kharkiv, and on 19 May, he provided the applicant with explanations on the refusal (see Annex 6).

8 *The arrest*

39. On 16 May 2011, the applicant fell ill. Due to state of health, she had to leave to home before the end of the Kiev Pechersk District Court’s (Pechersk Court) hearing where her appeal against Decree to initiate the criminal case was considered and to call a doctor.

40. The doctor prescribed, among other things, one week of bed rest. The applicant’s defence counsel informed the investigator about her illness and doctor’s prescription (see Annex 7).

41. Due to her illness, the applicant did not appear to the investigator’s office on 19 May 2011.

42. On 19 May 2011, the applicant’s defence counsel served to the investigator the original medical certificate issued by “Medicom” clinic which confirmed the applicant’s state of health and doctor’s instructions.

43. On 20 May 2011, the applicant watched one of the state TV channel and saw that participants of one of the popular political talk show discussed the charges against her. In the applicant’s opinion, some members of the Parliament from the ruling political party participating in the show

made insulting statements in respect of her activity in the capacity of the Prime Minister and voiced false information about the charges and the course of investigation. Whereas such slander has become systemic and turned out in political propaganda, the applicant, in spite of her state of health, decided to arrive to the TV channel and take part in talk show in order to refute those false and insulting statements, which could injure her personally and her political party. She left the TV channel soon and came back home.

44. On 23 May 2011, the applicant notified the Prosecutor General's office that she could attend investigative actions despite feeling unwell.

45. The same day, the applicant's defence counsel personally obtained from the investigator a summons that ordered applicant's arrival to the investigator's office at 10am on 24 May 2011.

46. On 24 May 2011, the applicant, accompanied by her defence counsel, voluntarily arrived to the premises of investigating department of the Prosecutor General's Office to take part in investigative actions.

47. As soon as the applicant and her defence counsel entered the investigator's office, about 25-30 hefty men wearing black uniform and masks, with the "Militia" signs on their backs, ran out of numerous rooms. Those men blocked the entrances to the corridor of the ground floor of the building and surrounded the applicant and her defence counsel.

48. The investigator said the applicant was detained, drawn a respective report and handed it to the applicant for familiarization. The investigator also familiarized her with the Pechersk Court's warrant of 23 May 2011, permitting the applicant's detention for bringing her to the court for jail or bail hearing (see Annex 8).

49. As the mobile communication coverage in the building was absent, the defence counsel tried to leave the building in order to make necessary calls and take the documents from the car. However, he was not allowed to leave and was physically prevented from doing so.

50. During detention the applicant was announced the official charge in the criminal case on "gas contract". Then the applicant was informed that she would be interrogated. She was not allowed to have confidential meeting with her defence counsel before interrogation.

51. After interrogation, she was familiarized with investigator's decrees ordering forensic expertise and with relevant expert conclusions, and then formally informed about completion of pretrial investigation.

52. Totally, the applicant was detained from 10am until 6pm and then released following the investigator's written order (see Annex 9).

1.5. Appeal against decision on initiation of a criminal case

53. On the 4 May 2011, the applicant appealed to the Pechersk district court of Kiev against the decision on initiation of the criminal case regard-

ing “the gas contract”. The applicant referred to the absence of *corpus delicti* in her activities, referring to expert opinions, and letters of the Minister of Justice of Ukraine and the Deputy State Prosecutor of Ukraine.

54. On the 16 May 2011, the Pechersk district court refused to satisfy the applicant’s complaint (see Annex 14). The Court referred to the fact that it cannot assess evidence submitted by defence to support the applicant’s claim on the absence of criminal actions while conducting the court procedures.

55. On the 8 June 2011, the Court of Appeals of Kiev ruled to let stand the decision by the Pechersk district court (see Annex 15).

9 National Legislation

10 Criminal Code of Ukraine

Article 210. Violation of law on budget system of Ukraine

1. Use of budget funds by an official contrary to their target allocation or in amounts exceeding approved expenditure limits, and also failure to comply with requirements related to proportional decrease of budget expenses or proportional financing of expenditure items of budgets of all levels pursuant to applicable budget legislation, where large amounts of budget funds are involved, -

...

2. The same acts committed in respect of especially large amounts of budget funds, or repeated, or committed by previous concert, -

shall be punishable by restraint of liberty for a term of two to five years, or imprisonment for a term of two to eight years with the deprivation of the right to occupy certain positions or engage in certain activities for a term up to three years.

Note.

1. Budget funds are the funds of budgets of all levels irrespective of the source of their formation.

2. Large amount of budget funds in Articles 210 and 211 of this Code shall mean the amount that equals or exceeds 1,000 tax-free allowances.

3. Especially large amount of budget funds in Articles 210 and 211 of this Code shall mean the amount that equals or exceeds 3,000 tax-free allowances.

Article 211. Issuance of regulatory or ordinance documents that modify budget revenues and expenses contrary to the procedures prescribed by law

1. Issuance by an official of the regulatory or ordinance documents which modify budget revenues and expenses contrary to the procedures prescribed by law, where large amounts of budget funds are involved, -

...

2 The same actions committed in respect of especially large amounts of budget funds, or repeated, -

shall be punishable by imprisonment for a term of two to six years with the deprivation of the right to occupy certain positions or engage in certain activities for a term up to three years.

Article 364. Abuse of authority or office

1. Abuse of authority or office, that is a willful use of authority or official position contrary to the official interests by an official for mercenary motives or other personal benefit or benefit of any third persons, where it caused any substantial damage to legally protected rights, freedoms and interests of individual citizens, or state and public interests, or interests of legal entities, -

...

2. The same act that caused any grave consequences, -

shall be punishable by imprisonment for a term of three to six years with the deprivation of the right to occupy certain positions or engage in certain activities for a term up to three years.

...

Note. 1. Officials shall mean persons who permanently or temporary represent public authorities, and also permanently or temporary occupy positions in businesses, institutions or organizations of any type of ownership, which are related to organizational, managerial, administrative and executive functions, or are specifically authorized to perform such functions.

...

4. For the purposes of Articles 364 to 367, grave consequences with reference to any pecuniary losses shall mean any such consequences that equal to or exceed 250 tax-free allowances.

Section 365. Excess of power or official authority

1. Excess of power, that is a willful commission of acts, by an official, which obviously exceed the authority and power vested in him/her, where it caused substantial damage to the legally protected rights and interest of individual citizens, or state and public interests, or interests of legal entities, -

...

3. Any such actions as provided for by paragraph 1 or 2 of this section, if they caused grave consequences, -

shall be punishable by imprisonment for a term of seven to ten years with the deprivation of the right to occupy certain positions or engage in certain activities for a term up to three years.

11 Budget Code of Ukraine

Section 50. The State Budget of Ukraine Revenue Execution

...

4. Taxes, duties, and mandatory payments paid to the State budget shall be recorded directly in an integrated treasury account of the State Budget of Ukraine and shall not be accumulated on the accounts of the revenue collection units.

5. Taxes, duties, and mandatory payments paid to the State budget are considered to be accounted as State budget revenues at the moment they reach the single Treasury account of the State budget...

12 Code of Criminal Procedure of Ukraine

Article 94. Reasons and grounds for instituting criminal proceedings

...

Proceedings may be initiated only if sufficient data show that indicia of crime are present.

Section 148. Preventive measures

1. Measures of restraint are imposed on the suspect, accused, defendant, convict with a view to preventing his/her attempts to avoid inquiry, pre-trial investigation, or trial, obstruct establishing the truth in a criminal case, or continue criminal activity, as well as to ensuring execution of procedural decisions.

2. Measures of restraint are imposed if there are sufficient grounds to believe that the suspect, accused, defendant, convict can avoid investigation and trial or execution of procedural decisions, can obstruct establishing the truth in a criminal case or continue criminal activity.

3. If there are no sufficient grounds for imposing a measure of restraint, the suspect, accused, or defendant is asked to give a written obligation to appear upon the summons of the inquirer, investigator, prosecutor or court, as well as to inform on the place of his/her staying if the latter has been changed.

Article 150. Circumstances to be taken into account when imposing a measure of restraint

When deciding on the imposition of a measure of restraint, in addition to circumstances referred to in Article 148 of the present Code, there should be taken into account the severity of crime of which a person is suspected, charged, his/her age, state of health, family and property status, occupation, place of residence, and other circumstances characteristic of him/her.

Article 151. Recognizance not to leave the jurisdiction

Recognizance not to leave the jurisdiction consists in that a suspect or accused gives a written obligation not to leave his/her permanent or temporary place of residence without permission of the investigator.

If a suspect or accused ignores his/her recognizance not to leave the jurisdiction, the latter may be replaced with more severe measure of restraint; the suspect or accused should be told this when giving obligation not to leave the jurisdiction.

13 Resolution of the Plenary Session of the Supreme Court of Ukraine no. 15 of 26 December 2003, "On Judicial Practice in cases on excess or powers or authorities"

4... When deciding on whether the excess of the granted rights or vested powers is obvious, the courts must consider the extent to which it was obvious for an official and whether such a person realized the unlawfulness of his/her conduct. The motive and the aim of such actions may vary. As a rule, they do not influence the qualification of the crime.

5... the excess of power or authority should imply:

a) behaviour within the competence of the higher official of one or another agency;

б) commitment of actions permitted only in special cases, or on special permit or following the special procedure with the absence of such conditions;

в) commitment on one's own discretion of actions, which should have been committed only collectively;

г) commitment of actions, which nobody is entitled to commit or permit.

...

15. When an official exceeded his/her powers or authorities in order to prevent harmful consequences, more significant than actually caused damage and which could not otherwise be prevented, then such persons

actions committed in the situation of urgent necessity according to section 39 of the Criminal Code cannot be recognized as criminal.

III. STATEMENT OF ALLEGED VIOLATION(S) OF THE CONVENTION AND/OR PROTOCOLS AND OF RELEVANT ARGUMENTS

14

15 Introduction

56. The applicant submits that provisions of Article 5 § 1(c) of the Convention and Article 2 of Protocol No. 4 to the Convention have been violated in respect of her, whereas deprivation and restriction of her liberty were not justified under the national law and were arbitrary.

57. The applicant believes that in her case no “reasonable suspicion” existed that she had been involved in the “offence” in the meaning of Article 5 § 1(c) of the Convention. Her argument concerning existence of the “reasonable suspicion” and “offence” applicable, *mutatis mutandis*, in the context of Article 2 of Protocol No. 4 of the Convention (see § 134).

58. The Court reiterated many times that “where the ‘lawfulness’ of detention is in issue, including the question whether ‘a procedure prescribed by law’ has been followed, the Convention refers essentially to the obligation to conform to the substantive and procedural rules of national law”.¹

59. Specifically the Court’s concluded that “in addition to its factual side, the existence of a ‘reasonable suspicion’ within the meaning of Article 5 § 1(c) requires that the facts relied on can be reasonably considered as falling under one of the sections describing criminal behaviour in the Criminal Code. Thus, there could clearly not be a “reasonable suspicion” if the acts or facts held against a detained person did not constitute a crime at the time when they occurred... The Convention refers here essentially to national law, but it also requires that any measure depriving the individual of his liberty be compatible with the purpose of Article 5, namely to protect the individual against arbitrariness”.²

60. The applicant well aware that it is not the Court’s function to deal with alleged errors committed by national authorities. However, she believes that when the right to liberty is at stake, it is important that any case of deprivation of liberty is not arbitrary.³ The applicant believes that since, under Article 5 § 1, failure to comply with domestic law entails a breach of the Convention, it follows that the Court can and should exercise a certain

¹ *Čonka v. Belgium*, no. 51564/99, § 39, ECHR 2002-I

² *Włoch v. Poland*, no. 27785/95, § 109, ECHR 2000-X

³ *Dougoz v. Greece*, no. 40907/98, § 54, ECHR 2001-II

power to review whether this law has been complied with⁴, including when determined existence of “reasonable suspicion” and “offence” in particular situation.

61. The applicant refers to the fact that the Court, for example, closely scrutinized the soundness of charges in cases *Lukanov v. Bulgaria* and *Włoch v. Poland* in the light of domestic criminal legislation.

62. In the *Włoch* judgment the Court, while has not recognized violation of Article 5 of the Convention, however noted that

“had the applicant's detention been based solely on the suspicion concerning his alleged involvement in the offence of trading in children, the legality of such detention, considering the existing contradictions in the interpretation of the domestic law, would have been doubtful”.⁵

63. In the *Lukanov* judgment, this Court has come to the following conclusions:

Turning to the particular circumstances of the case, the Court observes that it is undisputed that the applicant, as a member of the Bulgarian Government, had taken part in the decisions - granting funds in assistance and loans to certain developing countries - which had given rise to the charges against him.

However, none of the provisions of the Criminal Code relied on to justify the detention - Articles 201 to 203, 219 and 282 (see paragraphs 11 and 13 above) - specified or even implied that anyone could incur criminal liability by taking part in collective decisions of this nature. Moreover, no evidence has been adduced to show that such decisions were unlawful, that is to say contrary to Bulgaria's Constitution or legislation, or more specifically that the decisions were taken in excess of powers or were contrary to the law on the national budget.

In the light of the above, the Court is not persuaded that the conduct for which the applicant was prosecuted constituted a criminal offence under Bulgarian law at the relevant time.⁶

64. The applicant submits that – notwithstanding of all differences of her charges from those brought to the applicant in the *Lukanov* cases, – the common feature of the *Lukanov* and the applicant cases is that the conduct for which she is prosecuted did not constitute a criminal offence under domestic law at the relevant time.

65. As the issues whether any grounds exist to charge her of “offence” under the national criminal law and whether this criminal law is of requisite quality is one of the key issues in her complaints and applic-

⁴ *Douiyeb v. the Netherlands* [GC], no. 31464/96, § 45, 4 August 1999

⁵ *Włoch v. Poland*, no. 27785/95, § 115, ECHR 2000-XI

⁶ *Lukanov v. Bulgaria*, 20 March 1997, § 42-43, Reports of Judgments and Decisions 1997-II

able to her claims regarding violation of Article 5 § 1(c) of the Convention and Article 2 of Protocol No. 4 to the Convention, the applicant would like to produce her arguments in respect of each charge in a separate section below.

16 *The applicant's conduct did not constitute the "offences" in the meaning of the Convention*

66. The applicant submits that circumstances lied down by the prosecuting authorities, as a basis for charges against her, could not be reasonably considered as falling under any section of Criminal Code of Ukraine.

17 *"Kyoto money case"*

67. The applicant would like to draw attention of the Court to the fact that under this charge she was accused on two counts: concerning (1) event of mid-July 2009, when she adopted imputed order personally, and (2) event of 9 September 2009, when she signed the order, adopted collectively by Cabinet of Minister of Ukraine.

68. The applicant, firstly, will provide arguments related to both first and second counts of the charge, and, secondly, the arguments specifically related to the second count of the charge.

18 *Charge of excess of power*

19 *Improper allocation of "Kyoto money"*

69. One of the elements of *corpus delicti* under section 365 of the CCU is certain act of an accused that "obviously exceeds the authority and power vested in him/her".

70. The authorities have charged the applicant of signing the order to the State Treasury to conduct FX transaction through the NBU and to record funds received from this transaction at the integrated treasury account (ITA) of the State Treasury in breach of national law.

71. The prosecution also stated that the funds afterwards were allocated improperly, to cover needs, which these funds were not designated for (i.e. for purposes prescribed by Kyoto Protocol).

72. The applicant submits that the order imputed did not contain any reference to further allocation of the funds. As such, the order fall completely under the authority of the Prime Minister of Ukraine as stipulated in Article 50 §§ 4 and 5 of the Budget Code of Ukraine (see section 11 above).

73. Therefore, the prosecution argumentation on improper allocation of budgetary funds goes beyond the scope of the applicant's action underlying the charge.

74. Moreover, it is logically impossible to order that some particular piece of budget income be allocated to some particular piece of budget expenses.

75. All state budget revenues arrive in the single treasury account; all budget expenditures to discharge government obligations in accordance with the approved budget are made from the same account.

76. Therefore, it is impossible to reasonably state that any spending from integrated treasury account are related to funds originated from imputed FX transaction.

77. Despite this, the prosecution alleges that a number of disbursements made upon arrival of funds in the account following the exchange of USD 180 millions constituted a misuse of those very funds. The prosecution does not clarify how exactly it identified the so-called "Kyoto money" in the huge amounts of non-tangible money in the single treasury account.

78. Considering reasonable impossibility to identify those funds, the prosecution sporadically changed its allegations as to the allocations made at the expense of the "Kyoto money", ranging from payment of pensions to the purchase of flowers.

79. The applicant believes that the charge is the result frivolous interpretation by the prosecuting authorities of the law and principles governing budgetary activities of the Government.

80. Moreover, the applicant submits that allocation and prioritizing of expenses of the state budget in limits established by the relevant laws is an inherent power of the Government and Prime Minister.

81. In fact, she is accused for action that were encompassed by duty of the Government and her duty as a Prime Minister to seek the most appropriate solutions for implementation of the state obligations based on the resources at the Government's disposal.

82. The authorities accused the applicant that she allocated the money in breach of Kyoto Protocol provisions. The applicant accepts that under the Protocol the Ukraine has been obliged to allocate the funds from selling of "greenhouse gas quota" for some particular purposes. However, no one provision in Kyoto Protocol and in agreement on selling of "greenhouse gas quota" did not prescribed, and even implied, that the Government of Ukraine was obliged to storage the money received from selling of "quotas", to mark each and every euro received as "Kyoto money" and to use for "Kyoto protocol purposes" only money marked as "Kyoto money".

83. Moreover, in its response to the requests of the companies that bought "greenhouse gas quota" in issue, the Government of Ukraine stated that there were no irregularities in allocation of funds in issue.

20 *Damage*

84. Another element of the “excess of power” *corpus delicti* is the presence of “substantial damage” to “the state (public) ... interest ...”. The prosecution has been considered as a “damage” the loss of the State Treasury resulted from payment of commission to the NBU for relevant FX transactions.

85. The prosecution failed to give any substantiation of how payments from state budget to the NBU, which is public establishment and the property of the same state, may result in damage to the “state (public) interests” in general.

21 *Charge of abuse of power*

86. One of the key elements in *corpus delicti* under section 364 of the CCU is pecuniary or other personal incentive for imputed actions.

87. In this case, the authorities consider that the applicant’s personal incentive was, in fact, “the desire to avoid ... of failing to fulfil the state obligations” and “to ensure financing of the state budget expenditures” (see § 16 above).

88. The applicant believes that the desire of the Head of the Government to secure performance of the state obligations may not be reasonably treated as a criminal incentive to conduct official actions in the circumstances when, according to the prosecution, “there was an unfavourable situation in Ukraine to perform state obligations stipulated in the Law of Ukraine On the State Budget of Ukraine in 2009 (see Annex 1, p. 9).

89. The applicant also believes that failure of any establishment to fulfil its obligation would be “detrimental” for the head of the establishment. It is natural for the head to be interested in fulfilment of the obligation by the establishment managed by her or him. The applicant is stroked by the fact that the authorities accused her in that she perceived the possible failure by the Cabinet of Minister to fulfil the obligations of the state as a personal detriment.

90. Moreover, it cannot be reasonably stated that the actions of the Prime Minister aimed to secure performance of the Government obligations contradict “official duties”.

22 *Second count of the charge*

91. As to the second count of the charge concerning collective decision by the Cabinet of Ministers on 9 September 2009 (see § 11 and 67 above) the applicant, in addition to the arguments submitted above, refers to her arguments on the “cars case” (see §§ 93-97 below).

23 *Other charges*

92. The applicant submits that sections 210 and 211 are *lex specialis* in relation to section 365 of the CCU. Therefore, arguments provided above are relevant to the charged under these provisions.

24 *“Cars case”*

93. In this case, the applicant has been accused of having signed the resolution approved by a collegial body – the Cabinet of Ministers of Ukraine – in line with this body’s authority.

94. Even setting aside the issue of the Cabinet of Ministers authority to adopt such decisions, the applicant’s actions as the Prime Minister fail to demonstrate any elements of “crime” under section 364 of the CCU.

95. According to clause of Article 117 § 2 of the Constitution, and section 44 § 1(1) of the Law of Ukraine On the Cabinet of Ministers of Ukraine, the Prime Minister is *obliged* to sign the document approved by the Cabinet of Ministers as the collegial body. Therefore the applicant had no choice whether to sign or refuse to sign the mentioned document, irrespective of the fact whether she approved of its content or not.

96. A head of a collegial body cannot bear any responsibility for decisions of such collegial body, irrespective of the content of such decision or its consequences. The mentioned standpoint is fully reflected in the viewpoint held by the Supreme Court of Ukraine, as expressed in the Ruling of the Supreme Court Head of 26 December 2003, stating:

“Furthermore, the court failed to consider the fact that normative and legal acts and decisions may be approved both in person (individually) and by collegial bodies. According to the Law of 21 May 1997, № 280/97-BP “On local government in Ukraine” municipal council decisions are taken solely at plenary meetings of municipal councils in question, i.e., by a collegial body, and the head of the municipal council is only authorized to sign them. Therefore, the municipal council head may not be personally responsible for decisions taken by the municipal councils”.

97. Moreover, it is difficult to understand how deferring of customs duties payment by Cabinet of Minister may be treated as incurring “damage” to state interests. First, the decision prescribed deferring of payment, and not exemption, and second, the funds remained in public ownership in any case.

25 *“Gas contract case”*

26 *“Obvious excess of power”*

98. Charges under section 365 of the CCU bear that the applicant has abused her authority and taken a personal (individual) decision, namely,

the written “directive” (see § 28 above), while such a “directive” had to be adopted by the Cabinet of Ministers of Ukraine.

99. The authorities claim that such actions resulted in material losses to state interest for USD 194,600,000.

100. However, at the time of commencing criminal investigation and formal charge against the applicant, even more so at the time of the applicant’s arrest and detention, the prosecution had several documents excluding any “reasonable suspicion” of criminal actions of the applicant, in particular:

- the letter of the Minister of Justice of Ukraine of 7 April 2011 (see Annex 10);
- the letter of the Deputy General Prosecutor of Ukraine of 18 June 2010 (see Annex 11);
- verbatim records of the Cabinet of Ministers of Ukraine meeting of 19 January 2009 (see Annex 12);
- verbatim records of the Cabinet of Ministers of Ukraine meeting of 21 January 2009 (see Annex 13).

101. In his letter, the Deputy General Prosecutor of Ukraine informed that

“according to conclusions of the experts from Ministry of Justice of Ukraine and of the experts from the Koretsky Institute of State and Law under the National Academy of Sciences of Ukraine, the directive (decision) ..., adopted on 19 January 2009 by the Prime Minister of Ukraine may not be considered as “directive” of the Government under Ukrainian legislation”.

102. Similar conclusion was expressed in the letter of the Minister of Justice of Ukraine of 7 April 2011.

103. This meant that disputable “directive” of the Prime Minister, serving the factual basis for charge, is different decision – despite of the same name – and could not be governed by regulation related to the decision of the Cabinet of Minister. Therefore, correspondingly, such decision needed not to be approved by the Cabinet of Ministers. Nothing in domestic law prohibit to Prime Minister to adopt “directive” similar to that imputed to her, and the prosecution has not referred to any particular legislative clause in this respect.

104. According to verbatim records of the Cabinet of Ministers meeting of 21 January 2009, after the report by the Prime Minister, the Government approved the actions of delegation of Ukrainian Government at negotiation and approved the results of this negotiation.

105. Furthermore, this Government’s meeting was attended by the Deputy General Prosecutor of Ukraine, whose duty was exactly supervision over legality of the Cabinet of Ministers actions and decision, and she

expressed no doubt in legality of actions of either the Prime Minister or Government delegation at the negotiation. Later, neither the Prime Minister's decisions or actions, nor those of the whole Cabinet received any protest from the General Prosecutor's office.

27 *Damage*

106. The prosecution evaluates damages based on the following formula:

107. Technological process of gas transportation through the territory of Ukraine requires 3,6 million m³ of gas. Whereas in 2009 the price of gas increased approximately USD 52 in comparison with that in 2008, then to assess damages, the difference between the 2008 and 2009 gas prices was multiplied by the volume of "technological" gas consumed.

108. Thus, the damage has been calculated based on the assumption that had the incriminated actions of the applicant not taken place, the contract between Gazprom and Naftogaz would have provided for the 2008 price level.

109. The prosecution failed to comment on the following situation: when the applicant as the Prime Minister of Ukraine was forced to enter into negotiations with the government authorities of Russia, the latter, together with Mr. Miller, Gazprom top manager, stated in the harsh terms that Russia would conclude the contract with Ukraine on the purchase of natural for 2009 only at the price of USD 450 per 1000 m³. However, following applicant's negotiations the 2009 gas price for Ukraine was USD 233, which fact is acknowledged by the prosecution.

110. The prosecution failed to substantiate its conviction that the gas price for Ukraine would have remained at the 2008 level despite the fact that global natural gas price rallied. Considering the lack of such substantiation, the applicant cannot but suggest that she, in fact, has been charged of unfavourable market environment resulting in unfavourable, in view of the prosecution, contract between two subjects of private law.

111. Even supposing the applicant's actions under such mentioned conditions were insufficient, erroneous, or unsuccessful, it gives no direct evidence to "criminal character" of the applicant's actions.

28 *Resume*

112. The applicant believes that none of presented charges contain any elements that may be reasonably treated as an "offence" in the meaning of Article 5 § 1(c) of the Convention.

29 *Article 5 § 1(c) of the Convention*

30 *The Court's case-law*

113. The applicant refers to well-established case law of the Court that the “reasonableness” of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention which is laid down in Article 5 § 1(c).⁷

114. This Court frequently reiterated, “the ‘reasonable suspicion’ presupposes the existence of facts or information, which would satisfy an objective observer that the person concerned may have committed the offence”⁸. This Court also decided that “in addition to its factual side, the existence of a ‘reasonable suspicion’ within the meaning of Article 5 § 1(c) requires that the facts relied on can be reasonably *considered as falling under one of the sections describing criminal behaviour* in the Criminal Code. Thus, there could clearly not be a “reasonable suspicion” if the acts or facts held against a detained person *did not constitute a crime* at the time when they occurred”.⁹

115. Also, according to the Court’s conclusion “the expressions ‘lawful’ and ‘in accordance with a procedure prescribed by law’ in Article 5 § 1 stipulate not only full compliance with the procedural and substantive rules of national law, but also that any deprivation of liberty be consistent with the purpose of Article 5 and not arbitrary”¹⁰; “in addition, given the importance of personal liberty, it is essential that the applicable national law meet the standard of “lawfulness” set by the Convention, which requires that all law, whether written or unwritten, be sufficiently precise to allow the citizen – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail”.¹¹

116. The applicant believes that the requirements of “preciseness” and “foreseeability” are applicable to the notion of the “offence” in the meaning of Article 5 § 1(c) of the Convention, taking into account close connection of the above notion with the notion of “criminal offence” in Article 7 of the Convention.

117. In the view of this Court, in respect of the meaning of the “offence” “the Convention refers essentially to national law, but it also requires that any measure depriving the individual of his liberty be compatible with the purpose of Article 5, namely to protect the individual against arbitrariness”.¹²

⁷ *Fox, Campbell and Hartley v. the United Kingdom*, 30 August 1990, § 32, Series A no. 182

⁸ *Nechiporuk and Yonkalo v. Ukraine*, no. 42310/04, § 175, 21 April 2011

⁹ *Włoch v. Poland*, no. 27785/95, § 109, ECHR 2000-XI

¹⁰ *Benham v. the United Kingdom*, 10 June 1996, § 40, Reports of Judgments and Decisions 1996-III

¹¹ *Steel and Others v. the United Kingdom*, 23 September 1998, § 54, Reports of Judgments and Decisions 1998-VII

¹² *Bozano v. France*, 18 December 1986, § 54, Series A no. 111

118. The applicant believes that events serving the basis for prosecution, and being the basis for detention order issued by court, and actual detention on 24 May 2011, from an objective observer's viewpoint, could not be treated as abuse of power or official authority under section 365 of the CCU (see section 10 above).

119. Therefore, the applicant believes that there was no "reasonable suspicion" in the meaning of Article 5 § 1(c) of the Convention.

120. The applicant also submits that her detention was not aimed at preventing her escape, impeding investigation, or preventing any criminal offences in future.

121. The ruling of the Pechersk district court of 23 May 2011 contains the following argumentation:

- on 27 April 2011, the applicant wilfully left the premises of the Prosecutor's office without participating in investigatory actions;
- on 29 April 2011, the applicant dismissed her lawyer, and requested some time to be granted for the new lawyer to join the case;
- on 3 and 4 May 2011, the applicant arrived to the General Prosecutor's office without a lawyer, and then refused to participate in investigative actions without the lawyer;
- after 16 May 2011, the applicant failed to participate in investigative actions due to her illness, though at the same time she appeared at a TV talk-show on May 20, 2011;
- on 23 May 2011 the applicant failed to arrive for investigative actions.

122. The applicant states that these circumstances do not mean her evasion of court and pretrial investigation in the meaning of the Court's case law.

123. Some events mentioned by the Pechersk Court, even accepting the facts as presented by the authorities, are the use of unalienable right by the accused: refusal to take part in investigative actions without a lawyer present, refusal to provide any evidence. Failure to arrive to criminal investigator office in the period between 16 and 23 May 2011 is explained by the applicant's illness, the evidence of which was not contested by the authorities. The fact that the applicant has violated doctor's prescriptions and participated in a TV talk show does not exclude the fact of her actual illness.

124. It may be supposed that authorities exercised the following logic: since the applicant was able to participate in a talk show, she was equally able to participate in investigative actions. However, such logic fails to consider a substantial difference of participating in a talk show and investigative actions. Consequences from participating in investigative ac-

tions in unhealthy state are potentially more detrimental than those from the participation in a talk show.

125. Moreover, the Pechersk Court ruling fails to substantiate in what way detention of the applicant helps removing some risks mentioned, namely the applicant's unwillingness to cooperate with the prosecution, to present evidence or communicate with investigator without lawyer's presence, or the possibility of the applicant to fall ill.

126. The applicant believes that the authorities had neither "reasonable suspicion" in committing her "offence" in the meaning of Article 5 § 1(c) of the Convention, nor grounds to suspect any risk to justify her detention.

31 Article 5 § 5 of the Convention

127. The applicant submits that the issue of compensation for unlawful detention is regulated in Ukraine by the Law "On the Procedure for the Compensation of Damage caused to Citizens by the Unlawful Actions of Bodies in charge of Operational Enquiries, Pre-trial Investigation Authorities, Prosecutors or Courts"¹³. Under the Law, the right to such compensation arose where the unlawfulness of the detention was established by a judicial decision.

128. The applicant refers to the fact that she has no legal way to challenge the decision of the Pechersk district court at national level (see § 160 below). Therefore, she has no possibility to receive judicial decision on unlawfulness of her detention and to meet the precondition for her right to compensation.

32 Article 2 of the Protocol № 4 to Convention

129. The applicant believes that the restrictions imposed on her by undertaking not to leave her place of residence violate Article 2 of the Protocol № 4 to the Convention.

130. The applicant believes that restrictions placed of her freedom of movement has been not "in accordance with law" and not "necessary in a democratic society".

33 The restriction are not "in accordance with law"

131. The applicant accepts that the undertaking ("підписка про невиїзд") was provided for by the national legislation as a preventive measure against a person accused of committing a crime.

132. She believes, however, that the expression "in accordance with law" within the context of criminal prosecution also presupposes that legal grounds for underlying criminal prosecution exist, and, therefore, the

¹³ The provision of the Law may be found in the judgment of *Nechiporuk and Yonkalo v. Ukraine*, no. 42310/04, § 140-141, 21 April 2011

criminal prosecution is not arbitrary. Otherwise, unsubstantiated criminal prosecution could allow the state to restrict the freedom of movement without violating Article 2 of the Protocol № 4 to Convention. This could turn freedom of movement into “theoretical or illusory”, but not “practical and effective”.¹⁴

133. She refers to the Court’s case-law that

“with regard to the lawfulness of the measure, the Court reiterates its settled case-law according to which the expression ‘in accordance with law’ not only requires that the impugned measure should have some basis in domestic law, but also refers to the quality of the law in question, requiring that it should be accessible to the person concerned and foreseeable as to its effects”¹⁵.

“In order for the law to meet the criterion of foreseeability, it must set forth with sufficient precision the conditions in which a measure may be applied, to enable the persons concerned – if need be, with appropriate advice - to regulate their conduct”¹⁶.

134. The applicant believes that the wordings “in accordance with law” within the context of criminal prosecution, also relates to criminal law, serving the basis for accusations, including the requirements of its “foreseeability”. If the prosecuted behaviour contains no “crime” under national laws, then limitation of freedom of movement within the context of criminal prosecution cannot be considered as the one “in accordance with law”. In short, if there are no grounds for criminal prosecution, then criminal prosecution itself cannot serve the basis for restrictions under Article 2 § 3 of the Protocol № 4 to Convention.

135. As to the basis for criminal prosecution, the applicant refers to her argumentation in section 16 of this application. She believes that these arguments are equally applicable for analysis of whether the grounds for restriction of her freedom of movement were “in accordance with law” in the meaning of Article 2 § 3 of the Protocol № 4 to the Convention. She also believes that the evident absence of *corpus delicti* in actions she is charged of is sufficient to conclude that these limitations are not imposed “in accordance with law”.

34 *Is the restriction “necessary in a democratic society”*

35 *Grounds for this measure*

136. Even setting aside the arguments submitted above, the applicant still believes that the restriction was not “necessary in a democratic society”.

¹⁴ *Matthews v. the United Kingdom* [GC], no. 24833/94, § 34, ECHR 1999-I

¹⁵ *Rotaru v. Romania* [GC], no. 28341/95, § 52, ECHR 2000-V

¹⁶ *Gochev v. Bulgaria*, no. 34383/03, § 46, 26 November 2009

137. In accordance with national legislation, in order to apply undertaking, it is necessary to prove that reasons exist to believe the person suspected, accused, or convicted shall try to:

- escape the investigation and court, *or* escape performance of procedural actions,
- prevent establishment of truth in the case, *or*
- continue his/her criminal activities.

138. When applying the undertaking, none of the above risks was analyzed or substantiated. This measure was applied automatically, without any substantiation of its application to particular circumstances of the case or personal circumstances of the applicant. In any case, the impact of the restriction in the context of the applicant's activities as a politician was not considered.

139. At the same time, the applicant submits that prosecution agencies had no reasonable grounds to suggest the existence of any of the above-mentioned risks. The applicant has been interrogated 42 times since the charges were filed in December 2010. She has never tried to escape or prevent the investigation. On the contrary, the applicant expressed her maximum loyalty toward the prosecution by arriving at each summons.

140. The prosecution failed to consider the fact that her evasion from investigation could mean the ending of the applicant's political career, that the applicant remains the leader of one of the most influential political parties, and that her political aspirations and responsibility to those who support her could prevent her from taking such steps.

141. There had been no evidence that she had any reason to abscond. She had not absconded when her colleagues had been arrested and detained. She had publicly declared that she would face the prosecution and answer questions rather than be forced into exile.

142. The applicant also draws attention on the fact that the charges against her are extremely feeble, and that she expressed absolute certainty of overturning them at trial without resorting to any illegal actions.

36 *Possibility to revise the limitations*

143. The applicant refers to the Court's conclusion that "the domestic authorities are under an obligation to ensure that a breach of an individual's right to leave his or her country is, from the outset and throughout its duration, justified and proportionate in view of the circumstances".¹⁷ The applicant believes similar reasoning is applicable to freedom of movement within the territory of the country.

144. The applicant had no possibility to initiate any review of lawfulness of the undertaking. She refers to the conclusions of the Court that au-

¹⁷ *Riener v. Bulgaria*, no. 46343/99, § 124, 23 May 2006; *Földes and Földesné Hajlik v. Hungary*, no. 41463/02, § 35, ECHR 2006-...

thorities “may not extend for long periods measures restricting an individual’s freedom of movement without regular re-examination of their justification. Such review should normally be carried out, at least in the final instance, by the courts, since they offer the best guarantees of the independence, impartiality and lawfulness of the procedures. The scope of the judicial review should enable the court to take account of all the factors involved, including those concerning the proportionality of the restrictive measure”.¹⁸

145. The Code of Criminal Procedure of Ukraine does not envisage possibilities for the accused person to initially legal proceedings to have the appropriateness of such measure reviewed by court. The accused only has the right of the interlocutory motion submitted to the investigator on such a matter, but cannot appeal in court the refusal of the investigator.

37 *Resume*

146. The applicant believes that restriction of her freedom of movement was not imposed “in accordance with law”, since it was based on the criminal prosecution having no legal grounds.

147. The applicant also believes that it was not necessary in a democratic society, since it was applied automatically, without analyzing individual characteristics of the case or applicant’s personality, and the applicant had no adequate possibility to appeal against this measure.

38 *Article 18 of the Convention taken together with Article 5 § 1(c) of the Convention and Article 2 of the Protocol № 4 to Convention*

148. The applicant believes that the entire criminal prosecution of former members of the Government, who acted under her leadership, including her, had been politically motivated.

149. The applicant refers to the Court’s case law that “the whole structure of the Convention rests on the general assumption that public authorities in the member States act in good faith. Indeed, any public policy or an individual measure may have a “hidden agenda”, and the presumption of good faith is rebuttable”.¹⁹

150. The applicant submitted above the arguments that all charges against her – and, consequently, all related restrictions of her rights guaranteed by Article 5 of the Convention and Article 2 of the Protocol № 4 to the Convention, – were not based on circumstances that could give any independent observer “reasonable suspicion” in that the applicant, perhaps, was involved in committing a crime.

¹⁸ *Sissanis v. Romania*, no. 23468/02, § 70, 25 January 2007; *mutatis mutandis, Le Compte, Van Leuven and De Meyere v. Belgium*, 23 June 1981, § 60, Series A no. 43

¹⁹ *Khodorkovskiy v. Russia*, no. 5829/04, § 255, 31 May 2011

151. The applicant believes the manipulations with accusations against her, as well as her colleagues in the Government, pursue the following objectives, all interrelated but equally remote from criminal justice:

(1) cast a shadow over the party standing a good chance to rival the governing party and its leader at the election;

(2) impede the party leader's oppositional activity by occupying all her time through excessive engagement in criminal proceedings against her and restriction of her freedom of movement;

(3) intimidate the supporters and potential followers of the oppositional party by demonstrating to the society that support for the opposition is fraught with criminal consequences.

152. Political prosecution of the opposition commenced just after Viktor Yanukovych occupied the position of President of Ukraine in March 2010. Prosecution was primarily aimed at politicians closely connected with political party of the applicant, and those within the Government in 2008–2009. In particular, criminal investigations were initiated against the former Minister of Economy B. Danylyshyn, former Minister of Interior Yu. Lutsenko, former Head of the State Customs Service A. Makarenko, former Minister of Ecology and Natural Resources G. Philipchuk, First Deputy Head of the National Joint Stock Company "Naftogaz" I. Didenko, and many other officials of the former Government.

153. Taking into account political character of the prosecution against former representatives of the Government of Ukraine headed by the applicant, the Czech Republic granted political asylum to Mr. B. Danylyshyn. In particular, the decision of the Czech Ministry of Foreign Affairs states the following:

“Administrative body recognizes the proven political activity of the claimant in the then opposition political party BYT, and exercised activities of the Minister of Economy of Ukraine in 2007-2010. Incontestable is also the fact that criminal prosecution is initiated in Ukraine against this person on the grounds of abuse of power during the period when he held the position of the Minister of Economy of Ukraine in the Cabinet of Ministers of Yuliya Tymoshenko, and was among her closest colleagues. By his actions, in 2007-2010 the claimant fully and clearly expressed his political opinions, and after the political party BYT passed to opposition, he made his viewpoints known in mass media. In the current situation in Ukraine, it is quite possible that criminal prosecution against the claimant may be politically motivated as the consequence of the claimant's political activity, or that by means of criminalizing his personality, the current authorities try to limit the claimant's potential future political activities. The administrative body believes that the mentioned actions may be described as prosecution according to § 2 of the Law On granting political asylum. Participation in political life as

exercised by the claimant, and airing his opinions, containing possible criticism of the current authorities, represent activities that fully meet the definition of “exercising political rights and freedoms”, as one of the major political rights is the right to participate, directly or indirectly, in governing one’s own country, similar to exercising the freedom of thought and its manifestation. Having assessed the information submitted by the claimant, and having compared it against information on the country of origin, the administrative body came to the conclusions that the claimant is prosecuted in his own country for exercising his political rights and freedoms, in line with § 12(a) of the Law On granting political asylum, and that the claimant should be granted political asylum”.

154. The Monitoring Committee of the Council of Europe in its Information note on the fact-finding visit to Kyiv and Lviv (5-8 April 2011)²⁰ indicated that “recently, the Prosecutor General opened criminal cases against a number of former government officials belonging to the opposition, including against Ms. Tymoshenko for “excess of authority” and “abuse of office” and stressed:

“the fact that only former government officials that belong to the opposition are charged could indicate political revenge or selective justice, which would be unacceptable if that were the case. These concerns seem to be reinforced by the fact that the charges do not allege corruption but rather challenge the correctness of political decisions taken by the former government officials when in office, which, in effect, would amount to criminalizing political decisions”.

155. The spokesperson of the High Representative of the Union for Foreign Affairs and Security Policy and Vice President of the Commission, issued the following statement²¹:

“The EU has closely followed recent developments in the cases of Yuliya Tymoshenko and other members of the former government of Ukraine. At the request of the High Representative, the EU Head of Delegation is in contact with the authorities in Kyiv regarding the court decision of 23 May to detain Mrs. Tymoshenko, and to express our concern at suggestions of political motivation behind these cases.

The EU will continue to underline to the Ukrainian authorities the need for respect for the rule of law, incorporating fair, impartial and independent legal processes. We note the danger of provoking any perception that judicial measures are used selectively, and we stress the importance of ensuring the maximum transparency of investigations, prosecutions and trials. We consider these principles especially important

²⁰ AS/Mon(2011)16 rev., 31 May 2011, amondoc16r_2011, or. Engl. – <http://assembly.coe.int/CommitteeDocs/2011/amondoc16rev2011.pdf>

²¹ Brussels, 26 May 2011, A 207/11

in a country with which we intend to enter into a deeper contractual relationship built upon political association, and we recall that Ukraine currently holds the Chairmanship of the Committee of Ministers of the Council of Europe.”

156. In its report “Sounding the Alarm: Protecting Democracy in Ukraine”²², Freedom House expressed his continuing concerns regarding increased selective prosecution of political opponents in Ukraine.

157. David J. Kramer, executive director of Freedom House said that

“Ukrainian authorities have gone after Yuliya Tymoshenko with one criminal charge after another until they eventually succeed in throwing her in jail and removing her from the political scene... This amounts to a relentless and arbitrary campaign against the leading Ukrainian opposition figure and is an improper way to advance rule of law. Instead, it is rule by law and needs to stop... Such actions from Ukrainian authorities underscore an influx of politically motivated actions against former officials, including criminal charges levied against former interior minister Yuriy Lutsenko... Fighting corruption is critical but this is not a credible way to do so”.²³

158. The applicant draws attention to the fact that through censorship on TV and in other mass media, direct communication with people of the country remains the sole mode of political activities for her party, and this mode envisages frequent travel within the country and abroad that is prevented now by undertaking and redundant harassment from the side of investigating authorities (since January to May 2011 she has been interrogated 42 times).

159. The applicant believes that criminal prosecution against her, in all the entirety alongside with limiting her freedom of movement and detention was aimed at depriving of her personally and her political party in general of any possibility to express political opinion different from political opinion of the ruling political party.

IV. STATEMENT RELATIVE TO ARTICLE 35 § 1 OF THE CONVENTION

39 Final decision

N/A

²² http://freedomhouse.org/uploads/special_report/98.pdf

²³ <http://www.freedomhouse.org/template.cfm?page=70&release=1420>

40 Other decisions

Ruling of Pechersk District Court of 23 May 2011

41 Exhausting domestic remedies

42 Article 5 of the Convention

5.1.1. As regards complaint against detention

160. The applicant believes that she has no effective remedies against violation of article 5 § 1(c) of the Convention. She was detained based on the court decision rendered in accordance with Article 165-2 § 4 of the Code of Criminal Procedure of Ukraine.

161. According to Decree of the Plenary Session of the Supreme Court of Ukraine No. 4 of April 25, 2003, "On application by courts of preventive measures in the form of detention and extension of the detention at the stage of pre-trial investigation and inquiry", the law does not provide for appeal from a judgment passed in accordance with that provision.

43 As regards «reasonable suspicion»

162. The applicant believes that she used available means of legal defence to complain against criminal persecution as regards accusations in "gas contract" case, by having lodged complaint against starting the criminal investigation in line with Articles 236 §§ 7 and 8 of the Criminal Code.

163. She submits that this legal instrument proved ineffective in practice.

164. The applicant would like to draw attention to the fact that the court refused to determine whether the actions, that the applicant was accused of, contained criminal actions in terms of criminal laws. The court claimed, referring to its scope of authority, that during these particular court procedures it would not be looking into evidence that the defence has presented to confirm the absence of criminal actions.

165. The applicant believes that within the context of her complaint the court procedures under which the court has such a limited scope of authority to assess "reasonable suspicion", cannot be considered as an effective remedy.

44 Article 2 of Protocol No.4 to the Convention

166. The applicant insists that Ukrainian legislation does not provide for the challenge by the defendant of the preventive measure imposed on him/her. Such an opportunity is not provided even for the decisions on

detention²⁴, nothing to say about other preventive measures. Therefore, in the applicant's opinion national legislation does not provide any efficient protection from such a violation. Furthermore, lack of such a protection constitutes the merits of her complaint against violation of this provision, and the applicant requests to join the matter of exhaustion of the national remedies to the merits of her complaint.

²⁴ See for example as regards violation of Article 5 § 4 of the Convention, *Volosyuk v. Ukraine*, no. 1291/03, § 53, 12 March 2009

V. STATEMENT OF THE OBJECT OF THE APPLICATION

45

The applicant ask to recognize that Ukraine has violated Article 5 § 1(c) of the Convention, Article 2 of the Protocol № 4 to the Convention and Article 18 of the Convention taken together with the above mentioned provisions of the Convention.

Just satisfaction claims shall be formulated during further proceedings.

VI. STATEMENT CONCERNING OTHER INTERNATIONAL PROCEEDINGS

46

The applicant has not submitted the above complaints to any other procedure of international investigation or settlement.

VII. LIST OF DOCUMENTS

47 ONLY BY MAIL

1. Decision of investigator of 21.02.11 about bringing in as a defendant
2. Decisions of investigator of 19.05.11 about bringing in as a defendant
3. Decision of 20.04.11 about application of preventive measures
4. Motion of the applicant of 10.05.11 about abolition of undertaking and motion of 10.05.11 about a grant to permission on a journey to the Kharkiv area.
5. Decision on refusal of abolition of undertaking of 11.05.11.
6. Letter of investigator of 12.05.11 № 17/1/2-3151-11 on refusal to grant permission on departure to the Kharkiv area.
7. Certificate of Clinic of 19.05.11 and report of Tymoshenko to investigator of 16.05.11

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8. The Pechersk district court ruling of 23.05.11 and protocol of detention of 24.05.11
 9. Decision of investigator on release of 24.05.11
 10. Letter of Ministry of Justice of Ukraine of 07.04.11
 11. Letter of public prosecutor's office of 18.06.10
 12. Verbatim records of meeting of government of 19.01.2009
 13. Verbatim records of meeting of government of 21.01.2009
 14. Pechersk district court ruling of 16 May 2011
 15. Kyiv Appeal Court ruling of 8 June 2011

VIII. DECLARATION AND SIGNATURE

48

I hereby declare that, to the best of my knowledge and belief, the information I have given in the present application form is correct

Kharkiv

21 June 2011